# In the United States Bankruptcy Court
# for the
# Southern District of Georgia
## Brunswick Division

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|---|---|---|
| In the matter of: | ) | |
| | ) | Adversary Proceeding |
| WILLIAM CHARLES CARROLL | ) | |
| LILLIAN F. KIRTON | ) | Number 04-2091 |
| (Chapter 7 Case Number 02-21878) | ) | |
| | ) | |
| *Debtors* | ) | |
| | ) | |
| | ) | |
| | ) | |
| WILLIAM CHARLES CARROLL | ) | |
| LILLIAN F. KIRTON | ) | |
| | ) | |
| *Plaintiffs* | ) | |
| | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| AURORA LOAN SERVICES, INC. | ) | |
| | ) | |
| *Defendant* | ) | |

**MEMORANDUM AND ORDER**

On April 7, 2005, a trial in the above-styled Adversary Proceeding was held. After review of the pleadings and other papers on file in this matter and after consideration of the evidence introduced at trial and the testimony of William Charles Carroll, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In July of 1998 Lillian F. Kirton ("Ms. Kirton") executed and delivered to the United States Small Business Administration ("SBA") a Note in the original principal amount of $14,800.00 (the "Note").

To secure repayment of the amounts due under the Note, Ms. Kirton executed and delivered to the SBA a Deed to Secure Debt dated July 23, 1998 (the "Deed"). The Deed granted the SBA a first priority lien on certain improved real property located at 44 North McDonald Street, Ludowici, Georgia (the "Property").

On or about December 23, 2002, the Note and Deed were assigned to Aurora Loan Services, Inc. ("Aurora").

On November 27, 2002, William Charles Carroll and Lillian F. Kirton (hereinafter the "Debtors") filed a Chapter 13 bankruptcy.

On January 10, 2003, Aurora filed a proof of claim in the amount of $4,885.58. On November 4, 2003, the Debtors filed a Motion for Reconsideration of Aurora's Proof of Claim ("the Motion to Reconsider"). On December 3, 2003, a hearing on the Motion to Reconsider was held. Aurora did not appear and this Court entered an Order reducing Aurora's proof of claim by $1,836.58.

On January 26, 2004, Aurora filed a Motion for Relief from Stay (the "First Motion to Lift") alleging that the Debtors defaulted in the payments due Aurora for the months of October 2003 through January 2004. Each payment is in the amount of $68.00 In addition, Aurora

sought $800.00 in attorney's fees for filing the First Motion to Lift. The Debtors subsequently made the past due payments, and on March 11, 2004, Aurora filed a Withdrawal of the Motion for Relief from Stay.

On July 15, 2004, Aurora filed another Motion for Relief from Stay (the "Second Motion to Lift") alleging that the Debtors defaulted in the payments due Aurora. On August 11, 2004, a hearing on the Second Motion to Lift was held. Following the hearing this Court entered an Order denying the relief requested by Aurora.

On July 16, 2004, the Debtors filed an adversary complaint seeking an order determining the extent of Aurora's debt and disallowing the attorney's fees charged for filing the First and Second Motion to Lift ("Count 1").

On October 22, 2004, the Debtors filed an amended adversary complaint alleging that Aurora issued three pay off statements to the Debtors which constituted an intentional and willful violation of the automatic stay ("Count 2").

On April 7, 2005, a trial was held before this Court. At the outset of the trial, Aurora made an offer of declaratory judgment as to the issues raised in Count 1 (the "Offer of Judgment") under which Aurora would deem the Debtors current post-petition as of March 30, 2005; therefore, no testimony or evidence was introduced with regard to Count 1.

Following the Offer of Judgment, this Court heard the testimony of William C. Carroll ("Mr. Carroll") with regard to the issues raised in Count 2. Mr. Carroll testified that he

received three unsolicited payoff letters from Aurora (the "Payoff Letters"). The Payoff Letters were introduced and admitted into evidence. Mr. Carroll testified that receipt of the Payoff Letters lead him to believe a foreclosure of the Property was imminent and this caused him a great deal of stress and put a strain on his family relationships.

## CONCLUSIONS OF LAW

Count 1

This Court accepts the Offer of Judgment made by Aurora and hereby declares the Debtors current post-petition as of March 30, 2005. Any and all attorney fees and costs, escrow advances, late fees, property preservation fees and all other costs whatsoever are waived and the principal amount due under the Note as of March 30, 2005, is $14,149.20. In addition, Aurora is ordered to amend its arrearage claim to reduce it by $507.00 to reflect certain escrow payments made by the Debtors during the term of the bankruptcy case.

Count 2

A willful violation of the automatic stay is governed by 11 U.S.C. § 362(a). In pertinent part, the filing of a bankruptcy petition stays:

> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> 11 U.S.C. § 362(a)(6).

This Court holds that sending the Payoff Letters to Debtors does not constitute a willful violation of the automatic stay. A stay violation is willful if the creditor has knowledge

of the bankruptcy filing and deliberately acts in a way that violates the stay. Bishop v. U.S. Bank/Firstar Bank (In re Bishop), 296 B.R. 890, 894 (Bankr. S.D. Ga. 2003)(Davis, J.). The Payoff Letters did not include any language whatsoever that the amounts due under the Note were accelerated or that the entire balance was due and payable. The Payoff Letters also did not contain any language regarding a possible foreclosure. Further, the Payoff Letters specifically state that they are in reply to Debtors' request for payoff figures. Even if Debtors did not make such a request, it is clear that the Payoff Letters were not demands for payment. They contained no demand or attempt to collect a pre-petition debt. For that reason, there is no willful violation of the automatic stay.

Furthermore, even if there was a willful violation of the automatic stay, Debtor failed to prove any actual damages. Section 362(h) provides that a debtor injured by a willful violation of the stay "shall recover actual damages, including costs and attorneys' fees." Despite the mandatory tone of Section 362(h), the debtor bears the burden of proving actual damages.

Debtors did not produce any documentation in support of any monetary damages that they have incurred because of the receipt of the Payoff Letters; however, Debtors also argued that they experienced emotional distress from the Payoff Letters. Specifically, their family stopped speaking to them when they found out that they were in bankruptcy and unable to afford to pay their bills.

As this Court wrote, "an award of damages for emotional distress is appropriate where a natural and powerful emotional distress is readily apparent from the nature or extent of the wrongful conduct under the particular circumstances surrounding the stay violation." In re Bishop,

296 B.R. at 895. However, this emotional distress must be more than "fleeting and inconsequential." Stewart v. United States (In re Stewart), Ch. 7 Case No. 96-41379, Adv. No. 99-4171, 2000 WL 119437, at * 5 (Bankr. S.D. Ga. July 9, 2000).

In the case before the Court today, Debtors failed to demonstrate that their family problems stemmed from the receipt of the Payoff Letters from Aurora. Further, they presented no medical or other evidence that their distress related to the Payoff Letters was anything more than fleeting and inconsequential.

## O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtors are deemed current post-petition under the Note and Deed as of March 30, 2005, and the unpaid principal balance is $14,149.20.

IT IS FURTHER ORDERED that Aurora Loan Services, Inc., shall amend its proof of claim within thirty (30) days of the entry date of this Order to reduce its pre-petition arrearage claim by $507.00 to $1,367.85.

The Payoff Letters do not constitute a willful violation of the automatic stay and thus Debtors are not entitled to any compensation.

Lamar W. Davis, Jr.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 2005.